Filed 4/18/19 In re A.G. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.G., et al., Persons Coming Under the Juvenile Court Law.	B292240
	(Los Angeles County Super. Ct. No. 18CCJP03785A/B)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	
Plaintiff and Respondent,	
v.	
M.G.,	
Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Emma Castro, Referee. Affirmed.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

The juvenile court asserted jurisdiction over Father's two children based on Father's history of abusing methamphetamine and marijuana, his current use of marijuana and alcohol, and his criminal history of drug-related offenses. Father contends the juvenile court's jurisdictional findings were not supported by substantial evidence. Father also contends the court abused its discretion in ordering monitored visitation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Dependency Matter*

In June 2013, Father was arrested for transportation, sale, and/or distribution of a controlled substance; in August 2014, judgment was deferred and the charges were dismissed. In September 2015, Father was arrested again for transportation, sale, and/or distribution of a controlled substance; in January 2016, he was convicted and sentenced to three years of probation, the terms of which required him to complete a 26-week drug and alcohol counseling program, perform 300 hours of community service, and register as a narcotics offender.

In July 2017, the Department of Probation conducted a probation compliance check at Father's home. Mother and the children—A.G., then 16 months old, and H.G., then three months old—were sleeping in Father's bedroom at the time of the search.[1] The home "was found to be extremely filthy with fecal matter, soiled diapers, half-eaten food, [and] unwashed animals." The bathroom was also "dirty[] and highly cluttered," and it was "difficult to determine if the odor was emanating from the

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[1] Mother is not a party to this appeal.

bathroom, or [whether] the odor was from the fetid odor of the entire house." The probation team found an "air soft gun" on the bedroom floor, as well as a "small metal container . . . contain[ing] . . . methamphetamine" on top of the dresser drawer in the bedroom. When Father was informed by the probation officer of what was found, Father had replied, "Oh yeah, I forgot about that . . . [s]hit." He then admitted the drugs were "for [his] consumption; [he] was going to use it later that day."

Father was thereafter arrested for possession of a controlled substance, i.e. methamphetamine. He said he "got 'caught up' " with using methamphetamine since the year 2015, when he was 21 years old; he "would do it twice a week" and would " ' sniff it' instead of smoking it." He said Mother did not know he consumed methamphetamine and he had not told her because "she would get upset." He said because Mother lived "somewhere else," he would consume methamphetamine when Mother and their children "were not going to be around [him]." Mother said she knew Father would smoke "weed here and there; like once a week" and she knew he was arrested in 2016 for "sales" while she was pregnant with A.G., their first child.

As a result of the compliance visit, a referral of general neglect by both parents was made to the Department of Children and Family Services (DCFS). On July 27, 2017, DCFS removed the children from parents' custody "due to general neglect" and filed a Welfare and Institutions Code[2] section 300 petition. DCFS remarked in its detention report, "At that developmental age, it would not be unusual for the toddler to put items into her mouth,

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[2] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

such as the methamphetamine that was in clear view and [was in] direct access to the child(ren)."

On August 1, 2017, the court released the children to Mother against DCFS's recommendation. Mother, along with daughters A.G. and H.G., resided at St. Anne's—a "group home"—where Mother agreed to remain "for the safety of the children."

Approximately two months later, on September 25, 2017, the juvenile court dismissed the dependency petition as Mother and Father agreed to participate in a voluntary family maintenance case plan (hereinafter voluntary case plan). The voluntary case plan required Mother and Father to participate in conjoint counseling with one another; Mother to participate in individual therapy and a parenting education program; and Father to participate in a parenting education program, individual counseling to address substance abuse, and a substance abuse program including random or on-demand drug and alcohol testing.

Father did not enroll in a substance abuse treatment program for months, until December 8, 2017. He was later "discharged on February 28, 2018, due to lack of attendance." Father was a no-show for over 10 drug tests between October 2017 and April 2018 and tested positive for marijuana on December 8 and 14, 2017. Father tested negative "for all substances" on January 2 and 25, 2018, and three times between March 16, 2018 and April 27, 2018.

On May 4, 2018, the DCFS social worker advised Mother that DCFS would be "opening a court case" due to "[M]other and [F]ather not participating in couple's therapy," Father testing positive for marijuana twice in December 2018, Father missing

several drug tests, and Father failing to "complete[] a substance abuse program in the last 8 months."

B. *New Dependency Matter*

On June 8, 2018, the juvenile court authorized DCFS to remove and detain the children from Mother and Father. On June 13, 2018, Father—who had enrolled in a substance abuse program a second time—was discharged once more for lack of attendance.

On June 14, 2018, DCFS filed another dependency petition, alleging Father "has a history of substance abuse, including methamphetamine and marijuana, and is a current user of methamphetamine and marijuana, which renders [Father] incapable of providing regular care and supervision of the children." DCFS alleged A.G. and H.G. came within the jurisdiction of the juvenile court under section 300, subsection (b)(1), because: 1) Mother "knew or reasonably should have known of [Father's] substance abuse, and failed to protect the children by allowing [Father] to have continued unlimited access to the children and [their] home"; 2) "[r]emedial services failed to resolve the family problems," as Father "continued to abuse illicit drugs" despite having participated in substance abuse programs and drug testing; 3) A.G. and H.G. are "of such a young age that [they] require constant care and supervision and [Father's] substance abuse interferes with providing regular care and supervision of the children"; and 4) Father's current substance abuse and criminal history of drug-related offenses, as well as Mother's failure to protect, "endangers the children's physical health and safety, and places the children at risk of serious physical harm."

At the detention hearing on June 15, 2018, the court found a prima facie case to detain A.G. and H.G., and ordered the children released to "the home of [M]other." The court ordered "monitored visitation for [F]ather for two times a week for two hours" and did not permit Mother to act as visitation monitor. DCFS was ordered to provide referrals to Father for drug and alcohol counseling, provide referrals to Mother for drug and alcohol abuse awareness, and work with Father in setting up a written visitation schedule, with visitation supervised by a DCFS-approved monitor in a DCFS-approved setting.

C. *DCFS's Continued Investigation*

The DCFS social worker contacted the probation office and learned that Father had not complied with the criminal court orders, as he had not provided proof of enrollment in the drug/alcohol counseling program and had failed to register as a narcotics offender.

Mother reported that Father did not reside with her and the children, and that she was "unaware" whether Father was a current user of methamphetamine and marijuana. She said Father "probably . . . smokes marijuana." Mother stated she "want[s] to continue [being] in a relationship with [Father]" because she would not be able to take care of the children without his help. Mother added Father has not visited the children since they were removed from Father's custody.

Father indicated he "understood the reason for [c]ourt involvement regarding the children," and it was due to his failure to comply with the voluntary case plan. He attributed his failure to submit to the requisite drug and alcohol testing to his "social worker [not] really . . . explain[ing] to [him] how it worked" and he was "confused" as a result. Father stated he had not used

methamphetamine since the children's detention in July 2017. However, he admitted to his continued use of marijuana since July 2017; he added that he smoked marijuana "once or twice a week; here and there only" and that he used it "as a stress reliever."

Father tested negative for drugs and alcohol on July 23, 2018 and August 9, 2018. However, he tested positive for alcohol on August 3, 2018—the same day on which Father had a monitored visit with the children. Although Father was not observed to be under the influence of any substances during the visit, for DCFS "it remains a concern [that] Father continues to demonstrate his lack of parenting by testing positive for alcohol the same day he visited with the children."

In its jurisdiction/disposition report, DCFS recommended that Mother be ordered to comply with family maintenance services and to participate in conjoint therapy with Father and individual therapy to address case issues. DCFS recommended that Father receive enhancement services, and be ordered to comply with a drug and alcohol program with aftercare, random drug and alcohol testing on a weekly basis, a parenting education program, individual counseling, and conjoint counseling with Mother.

D. *Jurisdiction and Disposition*

At the jurisdictional and dispositional hearing on August 20, 2018, the court struck the allegations of "failure to protect" as to Mother.

It also struck the language from the petition which alleged Father was a "current user of methamphetamine," based on lack of evidence of his use since the filing; otherwise as to Father the court found the allegation true as amended. The court found

although Father agreed "to participate in services which involved testing and participation in the substance abuse program," he "continue[d] to test positive for marijuana and even if it's a low level of alcohol. Alcohol dissipates from one['s] body very quickly. [¶] To . . . have a result in a test of even 0.04 is not a good thing. It probably means that you were drinking the day that you took the test. Otherwise, within 24 hours it's very likely that alcohol would no longer be in your system for testing purposes. That's been the court's experience on these test results for alcohol." The court stated its concern that Father continued to use and be under the influence of marijuana when his children were "both toddlers" and were "too young to be able to verbalize any safety concerns or concerns regarding lack of supervision while in a parent's case, which is why there is an appellate-recognized exception frankly for marijuana use of parents who are supervising children under the age of 7. While marijuana may be legal in the state of California for parties over the age of 21, if you're taking care of children of tender years[,] there is concern that you not be under the influence of marijuana."

The court ordered Father to enroll in a substance abuse program, drug testing, a parenting education program, Project Fatherhood, and to participate in conjoint counseling with Mother. The children were ordered placed in Mother's home under the supervision of DCFS, and ordered monitored visitation for Father two visits per week, two hours per visit, to be monitored by a DCFS-approved monitor in a DCFS-approved setting. DCFS was given "discretion to liberalize visits" and "to allow paternal aunt . . . to be the monitor of [Father's] visits at St. Anne's facility."

Father timely appealed.

DISCUSSION

Father contends substantial evidence did not support the juvenile court's jurisdictional finding regarding his use—or abuse—of methamphetamine, marijuana, and/or alcohol and whether it placed his children at substantial risk of harm or danger. He further argues the court abused its discretion in ordering that Father's visitation be monitored. We disagree.

A. *Substantial Evidence Supports the Jurisdictional Finding.*

In reviewing a challenge to the sufficiency of the evidence supporting jurisdictional findings and related dispositional orders, we "consider the entire record to determine whether substantial evidence supports the juvenile court's findings." (*In re T.V.* (2013) 217 Cal.App.4th 126, 133; accord, *In re I.J.* (2013) 56 Cal.4th 766, 773.) "Substantial evidence is evidence that is 'reasonable, credible, and of solid value'; such that a reasonable trier of fact could make such findings." (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 199.)

Section 300, subdivision (b)(1), authorizes a juvenile court to exercise dependency jurisdiction over a child if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, or . . . by the inability of the parent . . . to provide regular care for the child due to the parent's . . . mental illness, developmental disability, or substance abuse." (§ 300, subd. (b)(1).) A jurisdictional finding under section 300, subdivision (b)(1), requires DCFS to demonstrate the following three elements by a preponderance of the evidence: (1) neglectful conduct, failure, or inability by the parent; (2) causation; and

(3) serious physical harm or illness or a substantial risk of serious physical harm or illness. (*In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; see also *In re R.T.* (2017) 3 Cal.5th 622, 624.)

Although there was no evidence of and no specific finding of past harm to A.G. and H.G. arising from Father's history of methamphetamine use and current use of alcohol and marijuana, the juvenile court "need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.) The legislature has declared, "The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.)

"On the other hand, our case law stands for the proposition that drug use or substance abuse, without more, is an insufficient ground to assert jurisdiction in dependency proceedings under section 300. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 769 [drug use without evidence that use has caused or will cause physical harm insufficient to support jurisdiction]; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1336–1338 [DCFS opinion that mother's use of alcohol and marijuana did not establish substance abuse]; *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 728 [substance abuse without more is insufficient to support jurisdiction].)" (*In re L.W.* (2019) 32 Cal.App.5th 840, 849.)

Father's reliance on cases holding that substance abuse without more cannot support a jurisdictional finding ignores the presumption involving children of "tender years." Under the "tender years" presumption, a "finding of substance abuse is

prima facie evidence of the inability of a parent . . . to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 767; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1385.) Here, the court found true the allegations set forth in the amended petition, including: that Father "has a history of substance abuse"; that "despite [Father's] previous participation in substance abuse counseling and random drug testing, [he] continued to abuse illicit drugs"; and that his "current substance abuse . . . endangers the children's physical health and safety, and places the children at risk of serious physical harm." At the time of the findings Father's children were an infant and toddler. Father does not challenge the juvenile court's finding that he is a substance abuser; instead, he argues there is insufficient evidence that his abuse of marijuana put A.G. and H.G. at substantial risk of serious physical harm. However, as DCFS argued in its brief, "[i]t cannot be disputed that with infants, even a moment of inattention can have disastrous consequences." Viewed in the light most favorable to the juvenile court's finding of risk, substantial evidence supports the court's finding.

B. *The Order for Monitored Visitation was not an Abuse of Discretion.*

Father contends the order for monitored visitation was an abuse of discretion. The welfare of a child "is a compelling state interest that a state has not only a right, but a duty, to protect." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) A juvenile court "may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child." (§ 362, subd. (a).) " '[T]he juvenile court has broad discretion to determine what would best serve and protect the

child's interest and to fashion a dispositional order in accordance with this discretion.' " (*In re Corrine W.* (2009) 45 Cal.4th 522, 532.) "We review an order setting visitation terms for abuse of discretion. [Citations.] We will not disturb the order unless the trial court made an arbitrary, capricious, or patently absurd determination." (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.)

Father contends "there was no evidence to support the need for such a restriction on his visitation" and that there was "no evidence [Father] was under the influence during visitation." This is not true, however, as Father tested positive for alcohol on the same day that he had visited his daughters, ages two and one.

Father also argues that Mother would ensure the children's safety while he is with them; however, that is still monitored visitation.

Substantial evidence supporting the court's jurisdictional finding also supports the court's visitation order. The juvenile court did not abuse its discretion in ordering monitored visits for Father.

DISPOSITION

The juvenile court's jurisdictional and visitation orders are affirmed.

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STRATTON, J.

We concur:

GRIMES, Acting P. J. WILEY, J.